Supreme Court, U.S.
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NO. 00-1349

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Fla. Dept. of Corrections
and
BRADLEY D. CARTER,
Warden, Union Correctional Institution
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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32pp

QUESTIONS PRESENTED

[as stated in the Petition]

1. Whether the Eleventh Circuit erred as a matter of law in denying Petitioner's habeas corpus petition alleging ineffective assistance of appellate counsel when it failed to assess counsel's performance under the legal standards in effect at the time of Petitioner's direct appeal.

2. Whether the Eleventh Circuit erred as a matter of law in denying Petitioner's claim of ineffective assistance of appellate counsel where counsel failed to raise an obvious claim of reversible error on direct appeal.

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JURISDICTION

Respondents Moore and Carter submit that the Petition presents a pure matter of Florida law. Since there is no federal question, no federal jurisdiction lies here. See § 2254(d), USC; U.S. Const. Art. III § 2, cl. 1.

STATEMENT OF THE CASE[1]

Respondents submit the following clarifications and additions to Rogers' Statement of the Case.

The Petition (pp. 4-7) discusses events surrounding the "Publix trial." The State clarifies (See Petition 5 n. 2) that it had called McDermid as a witness (I tab 2 248-65) in the first "Publix trial," in which Rogers pro se moved for and obtained a mistrial (I tab 2. 265-68). In the second "Publix trial, "which resulted in the convictions and sentences at issue here, the State did not call McDermid as a witness (See II tabs 5-7 APP 470-768).[2] Although so-called Williams Rule evidence was included

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[1] In this Brief in Opposition, "Rogers" or "Petitioner" indicates Petitioner, JERRY LAYNE ROGERS, SR., and "State" or "Respondents" refers to MOORE and CARTER. "Petition" references Rogers' Petition for Writ of Certiorari here, unless noted otherwise. The record is cited using its Appendix volume number in the U.S. District Court followed by any applicable tab# and page #(s). Where available, the consecutive page numbers of the appendix to the Petition for Writ of Habeas Corpus ("APP") are used. Bold typeface is supplied for emphasis.

[2] Instead, the State's evidence in the second trial included, for example, eyewitness in-court and photospread identifications of Rogers as one of the robbers in this case, including a "positive" one (II tab 5 APP 477-79, 528, 551-57); a newspaper clipping of this robbery found in Rogers' wallet when he was arrested (II tab 6 APP 602, 603-604); a gun recovered (continued...)

in the second trial (See Petition 5-6), accomplice testimony was deleted from the state's case-in-chief. Therefore, the second trial was not "vastly more difficult" (Petition 6).

The trial court's inquiry pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), was not "an abbreviated colloquy" (Petition 5). The adequacy of the trial court's Faretta inquiry was litigated in the Eleventh Circuit, which held it to be sufficient, and Rogers has abandoned that claim here. (See Petition 9 n. 5)

As part of its Faretta inquiry, the trial court, after hearing defense counsel's and Rogers' presentations (I tab 1 APP 2-7), noted Rogers' intelligence and experience, and informed Rogers that he would remain responsible for his case:

> THE COURT: Well, he's indicated he wants Mr. Tabscott [standby counsel] to help him with the logistics of witness management, and Mr. Tabscott has indicated he's willing to do that. But if I permit him to withdraw, he is not the attorney of record. Pleadings would not be furnished to him; they would be furnished to you. And he would not be responsible for the conduct of the trial.
>
> I can take judicial notice that you have gone through one trial in this court, and I know also as a

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[2](...continued)
from Rogers' residence (II tab 5 APP 563; tab 6 APP 601) of the same caliber as the one he used in the robbery (II tab 5 APP 476); substantial money recovered in Rogers' residence in small denominations (See II tab 6 APP 601: "large variety of bills"; APP 604. See also II tab 5 APP 564, II tab 6 APP 597), like the money stolen in this Publix robbery (II tab 5 APP 508); and, evidence identifying Rogers committing a similar robbery, i.e., the robbery of Daniels Market (II tab 6 APP 634-41, 669-74, 696-98).

matter of fact that you have gone through a trial before Judge Cornelius. So I know you have had at least two trials on the same – on charges of the same nature as the one that is pending here today.

So I agree with Mr. Tabscott that to the extent that one could represent one's self and not be a lawyer, you are probably as capable as anyone might be because of your experience in these cases.

It is my understanding of the law that in order to – that you have the right to represent yourself, and we cannot compel you to have a lawyer. All that needs to be done is for the court to establish that you are knowingly and voluntarily and intelligently requesting to represent yourself.

There is some suggestion that there needs to be a showing that you need to know what you're doing to some extent if you go to trial, but I'm sure that's the law. I believe on the basis of what's been told me that you are. I believe you have a high school degree, plus some college education, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: And for the record, though, I would make the finding that not only are you intelligently waiving your right to counsel, but that you also have some background and knowledge in the conduct of the trial and the rules of procedure that would make you something less than a neophyte if you should go to trial.

The Petition (pp. 6-7) quotes a portion of the state trial court's comments pertaining to Rogers' pro se logistical difficulties. The State will clarify this excerpt at length infra by quoting from its surrounding context showing the trial court's reasoning and concerns over Rogers' related motion for mistrial.

Rogers (p. 7) characterizes standby counsel's role as "restricted" and summarizes his pro se representation. Rogers concludes (p. 7) that standby counsel's role was only "advisory." The State disputes any suggestion that standby counsel's profile was obscure. Instead, in the argument section the State will cite to instances in which standby counsel's presence was very visible and his role very active, albeit in line with the directions set by Rogers.

In argument infra, the State will show where the trial court record reflects that Rogers multiple times re-affirmed his desire to represent himself and demonstrated a level of intelligence capable of grasping the constant reminder standby counsel provided of his ability to re-invoke his right to counsel, thereby satisfying the purpose of the state rule of procedure at issue here. Indeed, immediately after being sentenced on the instant charges, Rogers initiated the appointment of the public defender for purposes of appeal. (III tab 12 1298)

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that the state trial court did not violate Florida law, that is, Fla.R.Cr.P. 3.111(d). Therefore, state appellate counsel was not unconstitutionally ineffective for failing to raise a Rule 3.111(d) claim, and there is no federal question. The Petition erroneously interprets Florida case law as it existed at the time of the 1984 state

appeal, overlooks state-trial-court facts that distinguish the cases it now tenders as supposedly showing the merits of the omitted state-appeal claim, and erroneously asserts that Florida case law developed subsequent to the state direct appeal is entirely irrelevant to his Strickland[3] claim. Rogers' arguments are too little, too late. They concern pure matters of Florida law as applied in this case, resulting in no federal question.

ARGUMENT

THE ELEVENTH CIRCUIT CORRECTLY ASSESSED STATE APPELLATE COUNSEL'S PERFORMANCE UNDER APPLICABLE STATE LAW, WHICH DOES NOT SUPPORT THE CURRENT CLAIM, AND CORRECTLY DENIED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. THIS CLAIM IS A PURE MATTER OF FLORIDA LAW. IT DOES NOT PRESENT A FEDERAL QUESTION.

Rogers' Petition argues that counsel who represented him in a state direct appeal in 1984 was ineffective under Strickland because he did not tender a claim to Florida's Fifth District Court of Appeal. Rogers' claim would have argued that Florida Rule of Criminal Procedure 3.111(d) ("Fla.R.Cr.P. 3.111(d)") required that he be re-offered counsel at stages of the state trial-court proceeding subsequent to his invocation of the right of self-representation and that a failure to do so constituted per se reversible error. He argues that the omission of such an obvious appellate claim runs afoul of Strickland standards.

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[3] Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Rogers fails to show how the decision of the United States Court of Appeals, affirming the United States District Court's denial of habeas relief, is erroneous or, in any way, supports the exercise of this Court's discretionary jurisdiction. He is not entitled to habeas relief on the grounds reasoned in the lower federal courts as well others.[4]

1. The Petition presents no federal question.

As discussed in the ensuing pages, Florida courts have interpreted Florida's Rule 3.111(d) contrary to Rogers' position. Because the Petition's basis, Rule 3.111(d), is a matter of Florida law, which the state's courts have reasonably interpreted, there clearly is no danger that "the federal 'law as determined by the Supreme Court of the United States' might be applied by the federal courts one way in Virginia and another way in California," Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000).

Put another way, especially in light of the facts of this case, the Florida law discussed infra demonstrating that state appellate counsel did not unreasonably omit a Fla.R.Cr.P. 3.111(d) argument, is not "unprincipled or arbitrary,"

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[4] See, e.g., Dandridge v. Williams, 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 1156 n. 6, 25 L.Ed.2d 491 (1970) ("prevailing party may, of course, assert in a reviewing court any ground in support of his judgment"); Jaffke v. Dunham, 352 U.S. 280, 77 S.Ct. 307, 308, 1 L.Ed.2d 314 (1957) ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record"); Davis v. Packard, 32 U.S. 276, 282, 32 U.S. 276 (1833) ("question before this court is, whether the judgment was correct, not the ground on which that judgment was given"); Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 n. 3 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987) ("When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those given or relied on below").

"irrational or arbitrary," See Barclay v. Florida, 463 U.S. 939, 947, 103 S.Ct. 3418, 3423, 77 L.Ed.2d 1134 (1983).

There is no federal question here, See § 2254(d)(1), USC (writ may issue only if state-court adjudication "resulted in a decision ... contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States, or ***"); U.S. Const. Art. III § 2, cl. 1 ("*** arising under this Constitution, the Laws of the United States ***"),[5] and certainly not one meriting this Court's discretionary certiorari attention.

2. The claim procedurally fails because it was decided on an "independent and adequate state ground."

Rogers packages his Petition in terms of the applicable **state** law in effect at the time of his state appeal in order to assess the effectiveness of his state appellate counsel under Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, he overlooks that state courts' determinations are fatal to his current claim. The state court determinations constitute "independent and adequate state grounds" barring federal habeas relief. See Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991) ("independent and adequate state ground doctrine *** applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement"); Griffin v. Wisconsin, 483 U.S. 868, 875-76, 107 S.Ct. 3164, 3169-70, 97 L.Ed.2d 709 (1987) ("regulation, we must take

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[5] Based upon, inter alia, § 2254 and Art. III, the State also disputes Rogers' general assertion (Petition 20 n. 10) that the failure to raise state-procedure-based reversible error in a state appellate court per se violates a federal constitutional right.

that regulation as it has been interpreted by state corrections officials and state courts"; "Wisconsin Supreme Court--the ultimate authority on issues of Wisconsin law"); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2503-2504, 53 L.Ed.2d 594 (1977). See also, e.g., Lambrix v. Singletary, 520 U.S. 518, 522, 117 S.Ct. 1517, 1522, 137 L.Ed.2d 771 (1997).

In 1995 Rogers filed his state habeas corpus petition in the District Court of Appeals of the State of Florida, Fifth District, and claimed in it, inter alia, that "the trial court never renewed the offer of counsel to Rogers after he initially waived his right to counsel." Relying upon "Florida law," the state petition then argued that this failure to renew the offer of counsel ... constitutes reversible error" (IV tab 13 APP 1324-25) and further contended that counsel's failure to raise reversible error constituted ineffective assistance of appellate counsel. (IV tab 13 APP 1325) The State moved to dismiss the state habeas petition, primarily arguing various state procedural grounds. (IV tab 14 APP 1331 et seq.) Rogers responded to, and disputed, the State's motion to dismiss. (IV tab 15 APP 1373 et seq.) Subsequently, the state appellate court denied the State's motion to dismiss (IV tab 16 APP 1391), and, ultimately, the State filed its Response to Petition for Writ of Habeas Corpus, in which it, inter alia, asserted/re-asserted procedural grounds for denying the petition. The State's Response also opposed the petition on the merits. (IV tab 25 APP 1664 et seq.)

In 1996, the state district court of appeal, without enunciating its reasoning, denied the habeas petition. (IV tab 27 APP 1733) In his purported "facts," Rogers opts for arguing that the state appellate court reached the merits of the claim. (See Petition 10)

Without belaboring which is correct, there are two possible interpretations of the state appellate court's denial of the state habeas petition without opinion: It either denied it based upon **state** procedural grounds or on the merits of **state** law or perhaps on both grounds. In any of these possibilities, the claim is procedurally barred here as based upon an "independent and adequate state ground." See Coleman; Griffin; Sykes.

3. Florida case law subsequent to counsel's alleged ineffectiveness applies to a Strickland analysis.

In affirming the denial of the federal habeas petition, the Eleventh Circuit relied upon several Florida cases decided after the 1984 state direct appeal. The Eleventh Circuit reasoned that they indicate that Florida law does not require per se reversal where the offer of counsel is not explicitly renewed at subsequent stages of the proceedings. Instead, Florida's focus is upon the defendant's understanding of his rights. The gravamen of Rogers' current petition is that the Eleventh Circuit erred in relying upon Florida case law that developed after counsel's alleged ineffectiveness. The Eleventh Circuit decision is not erroneous.

Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841, 122 L.Ed.2d 180 (1993), is on point. There, a Strickland claim was based upon case law (Collins) as it existed at the time of the alleged ineffectiveness but that had been subsequently overruled to the defendant's detriment. There, the Eighth Circuit affirmed the U.S. District Court's grant of habeas relief holding that the pertinent state court was bound by the law that existed at the time of the alleged ineffectiveness, but this Court reversed the Eighth Circuit. Fretwell indicated that Strickland's prohibition against evaluating trial defense counsel's

performance against hindsight is a protection for counsel.[6] It is not intended as a "windfall" in which a defendant would benefit from an interpretation in the law that is ultimately abrogated. Thus, under Strickland's prejudice prong, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him," 506 U.S. at 372, 113 S.Ct. at 844, as ultimately determined by case law.

Contrary to Fretwell's holding, Rogers wants a windfall based on his snapshot of the law at the time of the alleged ineffectiveness. Here, as the Eleventh Circuit correctly determined, See discussion infra, a number of Florida cases have been decided that interpret Florida procedural law against Rogers' position arguing that a failure to renew counsel per se constitutes grounds for reversal.

Furthermore, the State respectfully submits that, consistent with Fretwell, common sense and sound judicial economy belie a re-trial or re-sentencing of a defendant where the re-trial or re-sentencing can be lawfully conducted exactly the same way that precipitated a reversal.

4. Florida law holds that its procedural rule requiring renewal of an offer of counsel does not per se require reversal.

As discussed above, Rogers' instant petition argues that Florida's Fifth District Court of Appeal reached the merits of his current claim. Therefore, arguendo, the state court of appeal has interpreted and applied Florida law against Rogers'

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[6] Accordingly, while counsel's performance is not unconstitutionally deficient for failing to anticipate changes in the law, s/he certainly should not be faulted for correctly anticipating a change.

position. Such a determination of state law is consistent with numerous others rejecting Rogers' per se approach.

Most importantly, in the related murder case against Rogers, the Florida Supreme Court held that the State requirement of renewing the offer of counsel at subsequent stages of the proceedings does not apply where standby counsel is present:

> We find no rule 3.111(d)(5) [Fla. Rule of Criminal Procedure] violation because the court appointed two prominent attorneys as standby counsel who appeared with Rogers at each stage of the proceedings. Rogers is not entitled to habeas relief on this issue.

Rogers v. Singletary, 698 So.2d 1178, 1180 n. 2 (Fla. 1996).[7] Here, standby counsel was appointed, present, and, although not required, even occasionally active. (See I Tab 4 APP 350-51; II tab 2 269-70, 278-82; II tab 4 296, 324, 330-31, 333-34; II Tab 7 APP 768-93; III Tab 8 APP 864-67; III Tab 9 APP 1012; III Tab 10 APP 1130-45)

Rogers, 698 So.2d 1178 (Fla. 1996) is not only binding law in Florida, it reasonably effectuates the purpose of the procedural rule at issue. The obvious purpose of Fla.R.Cr.P. 3.111(d) is to assure that a defendant knows that s/he generally

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[7] In the Eleventh Circuit, Rogers argued the concurring opinion in Rogers (Fla. 1996. However, Greene v. Massey, 384 So.2d 24, 27 (Fla. 1980), bluntly stated the principle: "A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court. *** The special concurring opinion has no precedential value ***." Accord Dunn v. State, 454 So.2d 641, 642 (Fla. 5th Dist. Ct. App. 1984) ("Concurring opinions do not represent precedential authority"). See also, e.g., Marks v. U.S., 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ..'" quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 (1976); Brown v. State, 719 So.2d 882 (Fla. 1998) (distinguished holdings of prior case from the concurring opinion in it); Santos v. State, 629 So.2d 838, 840 (Fla. 1994) ("Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision"; footnotes omitted); Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) (for Florida Supreme Court jurisdiction to review conflicts among district courts of appeal, conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision"; neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction).

Thus, while a concurring opinion might in a future case be persuasive in establishing precedent, it does not constitute precedent as such.

can invoke right to counsel at subsequent stages of the proceeding, such as at sentencing. If the defendant already knows that he can invoke counsel, then the purpose of the rule is satisfied. The presence of standby counsel serves as a reminder of the defendant's ability under Florida law to invoke counsel.

Accordingly, Harrell v. State, 486 So.2d 7, 8 (Fla. 3d Dist. Ct. App. 1986), held shortly after Rogers' direct appeal was resolved against him, See Rogers v. State (IV tab 27 APP 1733) (Fla. 5th Dist. Ct. App. 1985), that the "continuous presence of standby counsel served as a constant reminder to Harrell of his right to counsel." Harrell distinguished Sampson v. State, 466 So.2d 1181 (Fla. 1st Dist. Ct. App. 1985), on which Rogers relies (Petition 19 n. 8):

> In *Sampson v. State*, ... the defendant was not provided with standby counsel. In addition, unlike in *Sampson*, where the defendant was reported to be 'functioning intellectually at the borderline of mental defectiveness,' the record reflects that Harrell is very intelligent and sophisticated in legal matters.

Here, like Harrell, Rogers was very intelligent and relatively sophisticated in legal matters. Further, here Rogers has persisted in representing himself, and after the trials of this cause even boasted about his self-representation.

The trial court noted during the Faretta inquiry:[8]

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[8] The adequacy of this inquiry was at issue in the Eleventh Circuit, but Rogers has not pursued it here. (See Petition 9 n. 5) Nevertheless, the initial trial court inquiry under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in this case was part of the trial court proceedings that demonstrated Rogers' ongoing desire to (continued...)

THE COURT: *** I can take judicial notice that you have gone through one trial in this court, and I know also as a matter of fact that you have gone through a trial before Judge Cornelius. So I know you have had at least two trials on the same – on charges of the same nature as the one that is pending here today.

So I agree with Mr. Tabscott that to the extent that one could represent one's self and not be a lawyer, you are probably as capable as anyone might be because of your experience in these cases.

It is my understanding of the law that in order to – that you have the right to represent yourself, and we cannot compel you to have a lawyer. All that needs to be done is for the court to establish that you are knowingly and voluntarily and intelligently requesting to represent yourself. *** I believe you have a high school degree, plus some college education, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: And for the record, though, I would make the finding that not only are you intelligently waiving your right to counsel, but that you also have some background and knowledge in the conduct of the trial and the rules of procedure that would make you something less than a neophyte if you should go to trial.

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[8](...continued)
represent himself. (See Vol VII Doc 22 pp. 2-9, stamped 241-48; 1 Tab 1APP 2-9).

Rogers not only articulately handled his trials and but also repeatedly re-affirmed his desire to represent himself within this case. For example, he inquired of prospective jurors in the first trial of this case:

> MR. ROGERS: I agree. Does anyone feel uncomfortable with the premise that what we read in the newspaper and see on TV is not necessarily true? Is there anyone here that cannot accept that?
>
> ***
>
> MR. ROGERS: You believe that you can sit and listen and – Now, we're getting to a very important question here for the jury. The judicial system, the American judicial system is based on the premise of the presumption of innocence. You are presumed innocent until proven guilty.
>
> Now, if there is anyone here who thinks that because a person had charges filed against him or has been indicted or has an information filed, as in this case, that that person is guilty and it's up to him to prove his innocence, it is your duty now at this time to honestly come forward and say that's the way you feel. If you do not believe that as I stand here before you today, right now at this minute, that I am absolutely innocent, because no evidence has been presented, I'd like for you now to step forward, raise your hand.
>
> ***
>
> MR. ROGERS: I would backstrike number four.
>
> ***

MR. ROGERS: Your Honor, I would challenge number nineteen for cause. The lady works at the very same store that I am accused of having robbed. Although she admits that she doesn't remember the people right now, she may later, is what I'm worried about. These people are still working at that grocery store, and I'm sure that somewhere along the course of the trial, that's going to dawn on her.

[Trial court granted Rogers' challenge]

(I tab 2 APP 71, 77, 93, 94-95)

Rogers moved for mistrial (I tab 2 APP 214-15) and ultimately obtained a mistrial in the first trial of this case (I tab 2 APP 267-68).

After the mistrial, at the beginning of voir dire of the second trial in this case, at which Rogers was ultimately convicted, the trial court expressly asked Rogers, "Are you representing yourself? You are Mr. Rogers?," to which Rogers replied, "Yes, sir, Your Honor. I am representing myself." (I tab 4 APP 296)

In the second trial's voir dire, Rogers played to the sympathy of the jury while re-affirming his desire to represent himself:

Let me introduce myself first. In case you've forgotten, I'm Jerry Rogers. I'm the defendant in this case.

Voir dire is very important to me because this is the only opportunity I'll have to get to find out a little

bit about you people. And some of you are going to sit in judgment in here on me in this case.

I'm nervous, there's no doubt about that. You probably noticed that. I'm not very good at this. This is not my profession. By profession I'm a cabinet maker. I've chosen to represent myself in this case because I felt like I would have a better opportunity to do a better job than the people I would have had appointed to me. And I say appointed, because I was without funds, I was declared indigent in this case. And that meant I would have been appointed a Public Defender or an outside attorney. As it turned out, I was appointed an outside attorney. And I felt like the caseload that were on these people, type of people, is too great for them to put the time involved in such a case as this.

(II Tab 5 APP 421-22)

On November 5, 1983, while discussing jury instructions, Rogers corrected the trial judge regarding the possible sentences, while standby counsel's participation reminded Rogers' of counsel's continued availability:

THE COURT: Well, it's five for a third degree felony. Do you want the fine in there?

MR. TABSCOTT [standby counsel]: Do you want the fine?

MR. ROGERS: No, Your Honor.

THE COURT: Let's just tell them it's life imprisonment or probation for any period of years up to life. That's the minimum.

MR. ROGERS: Your Honor, --

MR. COCCHIARELLA: Say that again, please.

MR. ROGERS: I think the minimum is three because this is an armed robbery on each case.

(III Tab 10 APP 1134)

Rogers demonstrated his knowledge of his ability to re-invoke counsel when, a moment after being sentenced, **he initiated** the appointment of the public defender for the purpose of appeal:

MR. ROGERS: I have an affidavit of insolvency for purposes of appeal here, the original and a copy.

THE COURT: You got one there?

MR. ROGERS: The original and a copy for you. I ask that the public defender be appointed to cover my appeal.

(III tab 12 1298)

In a 1984 letter, soon after the second trial, in which the conviction is at issue here, Rogers went well beyond re-affirming his self-representation by boasting about it. He indicated that he had "represented himself on 4 cases so far," "demonstrated [his] capabilities," and achieved favorable dispositions on a number of them. (VII "Exhibit" C-1 to C-4)

In contrast to the abundant indicia, in the spirit of the Florida renewed-offer-of-counsel rule of procedure, that Rogers chose self-representation and continued to desire it with eyes wide open, Rogers (Petition 22) singles out one excerpt in the second trial (at II tab 7 APP 788) from which he now infers that "the trial court essentially told Rogers that he had made his decision and was stuck with it ***." However, the context of the trial court's comment was Rogers' logistical difficulty in securing tangible evidence and Rogers' pro se request for a mistrial on that basis. (See II tab 7 APP773-90) Therefore, the trial court commented and queried during the argument over Rogers' difficulties obtaining evidence and motion for mistrial:

> Well, what am I supposed to do about it? You know here we are in the fourth day of trial. And the jury is sworn. They're sitting out there waiting to hear some more evidence.
>
> ***
>
> Isn't it ordinarily the responsibility of the persons involved in the case to have their evidence under control at the time the case begins so they can proceed? I would think so. It's not my responsibility to do those things.

(II tab 7 APP 775) Further, the ellipsis in the quote (Petition 22) reflects omitted material that clarify that the discussion focused upon Rogers' motion for mistrial based upon his difficulty obtaining evidence. For example, immediately after stating "You take your choice, I guess," the trial court continued:

> I would try to think what happens if the Public Defender puts itself in a situation like this and doesn't

> have a witness subpoenaed or doesn't have evidence available. And well, we try to work with them and resolve it any way we can. But if they don't have the evidence there - [standby counsel interrupted the trial judge]

(II tab 7 APP 788-89) The following exchange between standby counsel and the trial court lead into the last part of the Petition's block quote:

> MR. TABSCOTT [standby counsel]: I don't know what else to do that hasn't already been done. You know, other than grant the mistrial and start all over again.
>
> THE COURT: Well, I don't see why we grant a mistrial. I mean, Mr. Rogers has undertaken to represent himself. And he goes by the same rules. I'll deny the motion for mistrial. Are you ready with the witnesses.
>
> MR. TABSCOTT: Judge this is something that could have happened to me or Mr. Cocciarella [the prosecutor].
>
> THE COURT: It didn't. I'm denying the motion.
>
> ***

(II tab 7 APP 790) Moreover, even here, standby counsel's role reminded Rogers of counsel's availability.

In sum, as reflected in the facts of this case, the current law in Florida reasonably interprets Fla.R.Cr.P. 3.111(d) so that it does not provide a windfall to defendants on the basis of a

failure of a trial to utter "magic words." There is no per se rule in which such a failure constitutes grounds for a new trial or new sentencing. See also cases cited by Eleventh Circuit (Petition A13-14).

In contrast to the majority opinion of the highest Florida state court on a matter of state law in Rogers (Fla. 1996) and in contrast to Harrell and other cases the Eleventh Circuit cites, the Petition (at pp. 16-18) summarizes nine cases that, even on the face of the Petition's argument, do not control or otherwise entitle Rogers to a new trial. The most noteworthy aspect of the Petition's discussion of all but three of these nine cases is that they concern the sentence as a separate stage of the proceedings, and even concerning sentencing, Rogers does not show how they establish a per se rule that totally ignores the purpose of Rule 3.111(d). Thus, erroneously interpreting those cases as controlling, they would only afford Rogers a new sentencing, not a new trial.

The three cases that Rogers argues (Petition 17) required a new trial are Clark v. State, 442 So.2d 1044 (Fla. 4th Dist. Ct. App. 1983), Tucker v. State, 440 So.2d 60 (Fla. 1st Dist. Ct App. 1983) , and Felton v. State, 438 So.2d 1049 (Fla. 3d Dist. Ct App. 1983). None of them demonstrate that appellate counsel was unreasonable for failing to base a state claim upon them.

In Clark, Florida's Fourth District Court of Appeal held that the trial court's Faretta inquiry was inadequate and "[m]oreover" held that the renewal requirement of Fla.R.Cr.P. 3.111(d) was not "fulfilled." It did not hold that all technical violations of the rule per se require reversal, and it did not address the situation here, where the purpose of the rule was satisfied.

In Tucker, Florida's First District Court of Appeal, like Clark, held that the Faretta inquiry was inadequate, thereby requiring a new trial, and addressed the applicability of Rule 3.111(d) only concerning the sentencing phase, without discussing whether any standby counsel would affect the inquiry.

Felton, like Clark and Tucker, did not discuss standby counsel or other indicia that the defendant understood his right to invoke counsel later in the proceedings. It therefore does not establish that appellate counsel was unreasonable for failing to argue it.

Therefore, concerning a new trial, the Petition asserts that state appellate counsel should have based a separate claim upon Felton and Clark, but neither control the facts of the instant case. Further, neither were decided by Florida's Fifth District Court of Appeal, the appellate court reviewing the direct appeal, and therefore neither were controlling precedent for the Fifth District, Cf Virginia Ins. Reciprocal v. Walker, 765 So.2d 229, 233 (Fla. 1st DCA 2000) ("the [Fourth District's] decision does not have the same binding effect in this court"); Durham v. Palm Court, Inc., 558 So.2d 59, 60 (Fla. 4th DCA 1990) ("we are not bound by" the First District's decision).

Only one of the nine cases Rogers discusses was decided by the Florida Supreme Court. Rogers argues (Petition 18) that State v. Sanderson, 469 So.2d 1383 (Fla. 1985), affirmed the portion of Sanderson v. State, 447 So.2d 374 (Fla. 1st DCA 1984), that vacated the defendant's sentence "for failure to renew offer for counsel." The State notes that Sanderson, if pertinent at all here, concerned only sentencing and it did not address whether Rule 3.111(d) can be satisfied under the totality of the facts of a case, the situation here.

Moreover, the State disputes Rogers' interpretation of the Florida Supreme Court's Sanderson opinion. It did not address the renewal of counsel issue there. The following is the Florida Supreme Court opinion, in its entirety:

> We accepted jurisdiction in *Sanderson v. State*, 447 So.2d 374 (Fla. 1st DCA 1984), because a portion of that decision conflicts with *Hicks v. State*, 452 So.2d 606 (Fla. 4th DCA 1984). We have approved *Hicks*, --- So.2d ---- No. 65,495 (Fla. May 23, 1985), and therefore quash the portion of Sanderson holding that a probationer is not entitled to appointed counsel at a probation revocation hearing. We approve the court's finding an insufficient waiver of counsel by Sanderson.
>
> The decision of the district court is therefore quashed in part, and approved in part, and remanded for further consideration in light of our approval of *Hicks*.
>
> It is so ordered.

469 So.2d at 1384. The Florida Supreme Court's approval of the portion of First District's opinion "finding an insufficient waiver of counsel by Sanderson" concerned the adequacy of the waiver not the procedural renewal of offer of counsel. See Sanderson, 447 So.2d at 376 (Fla. 1st Dist. Ct. App. 1984) ("If the appellant were entitled to appointed counsel at his revocation hearing, we would be constrained to reverse the order revoking probation because of the insufficiency of the trial court's inquiry regarding self-representation").

Moreover, except for Sanderson, and to the degree that they are at all pertinent, Florida district court of appeals decided

all of the cases Rogers discusses (Petition 16-18), and, if they somehow stand for per se reversal, they have been superseded by the Florida Supreme Court cases such as Rogers (Fla. 1996) and others upon which the Eleventh Circuit relied.[9]

In conclusion, Rogers' Petition presents arguments in which he hindsightedly second-guesses state appellate counsel, but, given the absence of controlling authority at the time of the 1984 appeal and the totality of the facts of this case, they do not rise to the Strickland level that any reasonable appellate counsel would have made them. And, given the authorities that have developed subsequent to the state direct appeal, under Fretwell, he has shown no prejudice.

5. The underlying federal petition for writ of habeas corpus was untimely.

The State argued in the U.S. District Court and in its Eleventh Circuit brief that this cause is barred by laches. Its Eleventh Circuit brief also cited to the one-year statute of limitation of 28 USCA § 2244. The State argued, and re-asserts now, that "nearly 11 years elapsed while Rogers 'sat on' his purportedly violated right to effective assistance of appellate counsel." It continues to contend that potentially significant transcripts of pertinent pre-trial hearings may have been lost due to Rogers' delay (See IV tab 14 p. 1611-15).[10]

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[9] See Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973) ("hold that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida"); Continental Assur. Co. v. Carroll, 485 So.2d 406, 409 (Fla. 1986) ("no district court can legitimately circumvent a decision of this Court").

[10] Rogers' Eleventh Circuit Reply Brief contended that the State did not establish that there are any missing transcripts, that the State (continued...)

CONCLUSION

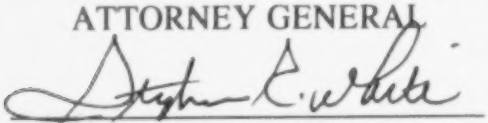
Based on the foregoing discussion, the State of Florida respectfully requests this Honorable Court deny the Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I certify that three copies hereof have been furnished to John Buchanan, III, Esq.,Timothy C. Hester, Esq., Mark E. Podara, Esq., Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20004-2401, by MAIL on March 29, 2001.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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[10](...continued)
failed to meet the requirements of Habeas Corpus Rule 9(a), and that the federal habeas petition was "timely under U.S.C. § 2244(d)."